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In the

Supreme Court of the United States

October Term, 1962

No. 505

MARIE MILLER AND JEANETTE M. EDELBLUTE,
Petitioners,

v.

EAST GEORGIA MOTORS, INC.,
A CORPORATION,
Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

B. ALLSTON MOORE, JR.
HAROLD A. MOUZON
Attorneys for Respondent

MOORE & MOUZON
4 Gillon Street
Charleston, S. C.

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QUESTIONS PRESENTED

We agree that the petition properly states the questions discussed therein, though we do not of course agree that these questions should be reviewed by this Court.

STATEMENT OF THE CASE

We are willing to accept the Statement of the Case in the petition so far as it deals with matters preceding the trial in the District Court. We cannot agree with the statement as to some of the testimony at the trial.

We cannot agree that the respondent offered no explanation as to why the petitioners' automobile ran off the highway. While we could offer no direct testimony that the driver, Mr. Laird, fell asleep, we did argue that this was a reasonable conclusion from the testimony.

We cannot agree with the statement on page 6 of the petition that the witness Berry "testified as to facts within his observance, of oil or grease on the lefthand brake." On the contrary, Berry said that he did not remove the wheel and could not positively say that there was anything on the brake.

We cannot agree with the statement on page 7 of the petition that the statements made by Mrs. Miller and Miss Edelblute were taken while they were under narcotics and in shock. The evidence is to the contrary.

We emphatically disagree with the final paragraph on page 6 of the petition as far as it reflects upon the decision of the Court of Appeals. We refer to the opinion of that Court for a correct "Statement of the Case."

ARGUMENT

I.

Should the Court of Appeals Have Directed That Judgment Be Entered for Respondent Instead of Merely Ordering a New Trial?

The petitioners assign no reasons why a writ of certiorari should be granted in this case except the general charge that the decision of the Court of Appeals in "a far departure from the accepted and usual course of judicial proceedings" and that it is in conflict with the decision of this Court in *Stewart* v. *Southern Railway Co.*, 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849. Petitioners contend that under this

decision the Court of Appeals, even if it reversed the District Court, should have ordered a new trial instead of directing the entry of judgment for the defendant.

We cannot agree. The situation with which the Court dealt in the *Stewart* case was very different from that in the present case. Stewart died as a result of his arm's being caught and crushed in the coupling between two cars. The Federal Safety Appliance Act required an automatic coupler which could be operated without going between the cars. A foreman testified that after the accident and after attempting to work the automatic coupler he went between the cars and worked the coupler by hand. The opinion went on to say:

> "He was not asked, and did not state, what effort he made to operate the pin lifter. Neither party asked him any further questions as to the working conditions of the pin lifter or coupler.
>
> "The petitioner insists that, in the absence of evidence on behalf of the respondent as to the condition of the coupler, the jury were entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler jaw by hand. The court below held the jury was not entitled to draw this inference in the absence of testimony by the foreman with respect to his efforts to use the pin lifter and as to its condition.
>
> "We hold that on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject.
>
> "The judgment must be reversed and the cause remanded to the court below for further proceedings."

In other words, a new trial was ordered because the court was of the opinion that there was a lack of evidence upon a vital issue, determinative of the case. Certainly that is not the situation in the present case.

There is nothing in th opinion of the Court of Appeals to support the suggestion in the petition (p. 9) that the Court regarded the petitioner's failure to call Mrs. Laird and Mrs. Richardson as "determinative" of the case. The Court was merely applying the well-recognized rule:

> "It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness." (20 Am. Jur. 182)

It would be rather unreasonable to permit a party to fail to call an apparently available witness on a material issue, without any explanation of such failure, and then to maintain that he is entitled to a new trial because the trial court commented upon the absence of the witness. Yet this appears to be the contention of the petitioners here. There was ample evidence to justify the Court of Appeals in directing entry of judgment for the defendant without any reference to the plaintiffs' failure to produce all available witnesses.

II.

Had the Respondent Waived Any Errors of Law or Fact or Findings of the Trial Court by Its Failure to Make Any Motions Before the Trial Court?

We are somewhat surprised that the petitioners should now attempt to raise this question. They served notice of a motion in the Court of Appeals to dismiss our appeal on

behalf of the respondent upon the ground that we had "at no time presented to the District Court any Motion for a directed verdict or for a new trial or for a judgment notwithstanding the verdict." The motion was noticed for hearing when the appeal was set for hearing on the merits in the Court of Appeals; but, although petitioners had devoted a large part of their brief to arguing the motion to dismiss, they did not so much as mention the motion in oral argument. The Court of Appeals did not refer to the motion in their *per curiam* opinion.

It appears to us that the discussion of this question on pages 9-12 of the petition ignores the fact that the case was tried in the District Court by a judge, without a jury. There was not and could not be a verdict, directed or otherwise, nor could there be a judgment notwithstanding a non-existent verdict. If authority be needed for what would seem to be self-evident, we call attention to *U. S.* v. *Lowenthal*, 7 Cir., 248 F. 2d 397, 398, where it was said:

> "Rule 50 of the Federal Rules of Civil Procedure applies to trials by jury only and a motion for a directed verdict is not applicable to nor proper in a non-jury trial. *Morris* v. *Prefabrication Engineering Co.*, 5 Cir., 1947, 160 F. (2d) 779."

In the latter case the Court said:

> "The point was specially and fully made in the motions for directed verdict and for judgment non obstante. We do not regard these motions, under the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, as being necessary or even proper where there is not a jury trial. * * *"

Likewise it was held in *Freightways, Inc.* v. *Stafford*, 8 Cir., 217 F. 2d 831, 837:

> "It is, however, contended by plaintiffs that the defendants cannot urge either the question of the irreconcilable conflict in the findings or the insufficiency of the evidence to sustain the judgments because they did not move in the trial court to modify or amend the findings nor for a new trial on the ground of insufficiency of the evidence to sustain the findings or the judgments. This contention, we think, is unsound. The case was not tried to a jury but to the Court. The rule as to the prerequisites to a review in such a case is well stated in Simkins Federal Practice, Third Edition, Section 648, as follows:
>
> > " 'When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made, in the District Court, an objection to such findings, or has made motion to amend them, or a motion for judgment.' "

The fact that the rule credited to Simkins is quoted verbatim from Rule 52(b) of the Rules of Civil Procedure does not lessen its authority.

III.

Did the Court of Appeals Have Authority to Consider an Appeal on Its Merits and to Reverse the Decision of the Trial Court Where the Sole Question Involved Is the Credibility of Witnesses?

Petitioners apparently contend that the Court of Appeals is without authority to consider the credibility of witnesses

or to question the views of the trial court as to their credibility. Such is not the rule. Rule 52(a) requires only that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It seems to us that the matter is fairly state in *Sanders* v. *Leech*, 5 Cir., 158 F. 2d 486, 487:

> "Under that rule (52a) as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that if the trial court where there if substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces them that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."

In the present case the Court of Appeals were obviously and strongly of the opinion that the findings of the trial court were not supported by any credible testimony. The *per curiam* opinion says:

> "Under all of these circumstances, we think that the plaintiffs' trial testimony, as to the crucial facts, so self-serving as it was, but so thoroughly contradicted out of their own mouths and that of the interested father and completely uncorroborated by witnesses whom they would be expected to produce if there was any truth in their trial testimony, was completely discredited. * * * On the whole record, the pretrial version of the occurrence, apparently concurred in by all of the injured parties, including the two plaintiffs, was

so overwhelmingly established that general findings, based upon the wholly inconsistent and opportunistic trial testimony, must be held to be clearly erroneous. Findings based upon obvious after thoughts, fabricated for the service of the plaintiffs' financial interest in the recovery of large sums of money as damages, should not be allowed to stand."

It is shocking to contend that the Court of Appeals was without power to do justice in such a situation.

IV.

Were the Trial Court's Decision on the Credibility of Witnesses and Its Findings of Fact Clearly Erroneous?

In their discussion of this question (Petition, pp. 14-24), petitioners clearly recognize that the vital point in the case is the credibility of petitioners' testimony at the trial as compared to their statements made shortly after the accident and introduced in evidence.

We do not think it necessary to discuss the testimony at any length, because it is fairly and succinctly analyzed by the Court of Appeals in their opinion. We content ourselves with pointing out some of the inconsistencies and inaccuracies in petitioners' argument.

They say, "The trial judge, who had the opportunity to observe not only petitioners when they testified, but also the demeanor of those whose testimony formed the basis for the introduction of the pretrial statements, rejected the pretrial statements." The surprising fact is that the trial judge did not reject the pretrial statements, except by inference. His opinion did not even mention these statements and their contradiction of the petitioners' oral testimony, though this was obviously a vital fact, if not the controlling fact in the case. The trial judge did not so much pass upon the credi-

bility of the witnesses as he did ignore the fact that the witnesses' pretrial statements made their credibility questionable.

There are several inaccuracies in petitioners' remarks about the pretrial statements. We mention only an example or two. They complain (Petition, p. 14) that their counsel was not present when the statements were taken. This was long before the petitioners commenced their actions and, so far as the record shows, long before they retained counsel. Again petitioners assert (Petition, p. 16) that at the time the Edelblute statement was taken she testified that she "suffered day long blackouts on account of her cerebral concussion and was under deep sedation," and that her jaws were wired so that she could not talk until mid-July. And yet the petitioners put in the deposition of Dr. Hull, Miss Edelblute's doctor, who did not mention blackouts or sedation, and the deposition of her dental surgeon, who said that the wires were removed nine days before her statement was taken and that then "the fracture was in proper alignment and patient was back to regular eating habits."

Petitioners explain away their failure to call Mrs. Laird and Mrs. Richardson to testify by saying:

> "Petitioners' counsel never head of the pretrial statements until the trial. Why should they go to the expense of having Mrs. Laird and Mrs. Richardson present to testify cumulatively to what petitioners would assert?"

The answer is that the deposition of Mr. Laird, the driver of the automobile, had been taken long, long before the trial and had flatly contradicted the stories which petitioners were to tell at the trial. They complain that the Court of Appeals was "overawed" by the Laird deposition, because he was testifying contrary to his financial interest. Then

they proceed to explain away the deposition by a reckless and baseless, if not libelous, suggestion:

> "The record does not show whether respondent has paid Mr. Laird — or Mrs. Laird, too, for that matter — and taken their general release. Or perhaps Mr. Laird and respondent had the same insurer whose common interest was in showing that the brakes were not defective and that Mr. Laird admitted no fault in the operation of the vehicle."

Perhaps a simpler explanation of Mr. Laird's testimony is that he is an honest man. At any rate, petitioners' counsel who cross-examined him did not see fit to question him as to any fraudulent conspiracy with the insurance company.

We submit that petitioners have entirely failed to show that the Court of Appeals was not amply justified in holding that the findings of the trial judge were clearly erroneous.

CONCLUSION

There are no valid grounds for granting a writ of certiorari in this case and the petition should be denied.

Respectfully submitted,

B. Allston Moore, Jr.
Harold A. Mouzon
Attorneys for Respondent

Moore & Mouzon
4 Gillon Street
Charleston, S. C.